

Asbestos Litigation and The Ohio Asbestos Litigation Plan: Insulating the Courts from the Heat

I. INTRODUCTION

Asbestos litigation is a complex and rapidly expanding area of product liability law. The proliferation of cases is a recent phenomenon which traditional court procedures are ill-equipped to handle. In response to this need, alternative methods have been developed in an attempt to alleviate the load on the courts, as well as to award timely compensation to successful plaintiffs. Some of these methods are successful, while others are not. A recent procedure fashioned by the Federal Court for the Northern District of Ohio is among the more successful. This Note examines the Case Management Approach in use in that District which provides an alternative to traditional litigation.

II. CHARACTERISTICS OF ASBESTOS LITIGATION

In the 1930s and 1940s, asbestos was used primarily as insulation in ships, schools, homes, and other industrial settings. Because of its resistance to heat, fire, and corrosion, asbestos is also used in brake linings, roofing products, and flooring products.¹ Asbestos is now linked to a number of diseases, most notably asbestosis, mesothelioma, and lung cancer.² As a result of the discovery of this link, over 30,000 people have filed product liability lawsuits against asbestos manufacturers claiming some type of asbestos-related injuries.³ Estimates of future cases suggest that an additional 100,000 to 200,000 claims may be filed

1. J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 3 (1983) [hereinafter COSTS OF ASBESTOS LITIGATION].

2. Asbestosis is the result of the slow growth of scar tissue in the air cells of the lungs at the site where inhaled asbestos dust rests. The scar tissue increases until it overtakes and strangles healthy tissue. Lung cancer resulting from asbestos exposure develops in the lower lobes of the lungs. Lung cancer occurs between two to eight times more frequently in groups previously exposed to asbestos. Mesothelioma is a type of cancer occurring in the lining of the lungs, abdominal cavity, or heart. B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 10-11, 37 (1984). See also I. SELIKOFF, ASBESTOS AND DISEASE 294 (1978).

3. D. HENSLER, W. FELSTINER, M. SELVIN & P. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985) [hereinafter ASBESTOS IN THE COURTS]. While this is not an unusually high number, most of these cases are concentrated in a few jurisdictions where asbestos use was widespread. Additionally, asbestos cases require inordinate amounts of time due to the complexity of issues. See *infra* notes 6-13 and accompanying text.

by the end of the century.⁴ Further complicating these cases are the large numbers of defendants involved in a typical asbestos suit. Typically, plaintiffs bring suit against the manufacturers, suppliers, and processors furnishing the asbestos. Thus, the average number of defendants in any one case is about twenty.⁵

Assigning culpability, or portions thereof, to the proper defendants is a complex task. Asbestos suits involve issues of worker's compensation, strict liability, and negligence.⁶ Risk of jury confusion is high. As of 1982, average awards paid on settled claims was \$54,000 for asbestosis, \$83,000 for lung cancer, and \$265,000 for mesothelioma.⁷ Estimates of future awards suggest total amounts of between four billion dollars and eighty-seven billion dollars.⁸ These huge awards reflect the high litigation costs involved in pursuing and defending an asbestos claim.⁹ In turn, these large awards and settlements are the catalyst for Chapter 11 reorganizations of many of the major asbestos manufacturers, specifically the Johns-Manville Corporation, UNR Industries, and the Amatex Corporation.¹⁰ Many existing and future claims are affected significantly by these bankruptcy proceedings.

Insurance indemnification¹¹ suits, while not unique to asbestos litigation, further complicate the matter. In an effort to escape large awards paid to successful plaintiffs, asbestos manufacturers seek reimbursement from their insurance companies.¹² The insurance companies argue that their policies do not require indemnification.¹³ Most policies require the insurance company to pay damages as a result of bodily injury. The dispute arises in defining the term "bodily injury." Is this when the

4. T. LAMBROS, OHIO ASBESTOS LITIGATION: CASE MANAGEMENT PLAN AND CASE EVALUATION AND APPORTIONMENT PROCESS 2 (1983).

5. COSTS OF ASBESTOS LITIGATION, *supra* note 1, at 3.

6. Note, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871 (1983).

7. ASBESTOS IN THE COURTS, *supra* note 3, at 1.

8. *Id.* See also COSTS OF ASBESTOS LITIGATION, *supra* note 1, at vii, Table S.2.

9. COSTS OF ASBESTOS LITIGATION, *supra* note 1, at 39, Table 6.1. Plaintiff's legal fees and other litigation expenses amount to \$164 million out of \$400 million compensation paid by defendants or their insurance companies.

10. B. CASTLEMAN, *supra* note 2, at 536-40. See also Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation vs. The Common Law Tort System*, 61 TEX. L. REV. 1297, 1300-14 (1983).

11. An indemnity contract is one in which one party agrees to indemnify the other party against loss or damage. One such contract covering employee injury compensation would require an insurance company to reimburse an employer for any loss incurred as a result of a finding of liability. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

12. See, e.g., Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *reh'g denied*, 455 U.S. 1009 (1982).

13. See, e.g., Eagle-Picher Indus. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983). Here, two insurance companies argued two separate theories of contract interpretation limiting the duty to indemnify.

disease manifests itself?¹⁴ Or is it, as the manufacturers argue, from the first exposure?¹⁵ The courts are split on this issue, although the results in all cases required indemnification to some degree.¹⁶

III. EXISTING EFFORTS TO DISPOSE OF ASBESTOS CLAIMS

A. Traditional Approaches

The large number of claims, the presence of multiple defendants, the financial stakes involved, and the threat of the absence of a "deep pocket,"¹⁷ all combine to present courts with serious difficulties as they attempt to dispose of asbestos claims in a timely fashion. Commentators speculate that some jurisdictions with large caseloads that persist in hearing cases in a traditional case-by-case approach will not dispose of *existing* cases until well into the twenty-first century.¹⁸ Other jurisdictions dispose of cases through group processing. This method has proved inadequate, as many plaintiffs wait between three and five years for resolution of their cases.¹⁹ Attorney's fees can run as high as \$100,000 as each case drags through the courts.²⁰ In most situations, this is a denial of justice as claimants fail to receive adequate compensation as they cope with illness, or die before their cases are heard or settled. Those claims that are settled typically give an average of \$35,000 to the claimant from an award of \$60,000.²¹

14. *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1216 (6th Cir. 1980), *reh'g denied*, 455 U.S. 1009 (1982).

15. *Id.* at 1217.

16. *See Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 456 U.S. 951 (1982) (insurer found fully liable to the manufacturer of asbestos-containing products causing diseases). *See also AC&S, Inc. v. Aetna Casualty and Sur. Co.*, 576 F. Supp. 936 (E.D. Pa. 1983) (insurers not liable for full coverage if multiple policies are triggered).

17. Deep pocket is a colloquialism used in the law to identify large financial resources potentially targeted for liability.

18. ASBESTOS IN THE COURTS, *supra* note 3, at 5.

19. *Id.*

20. *Id.* at 17.

21. The following table summarizes the average compensation and expenses per claim.

Average Expenses and Compensation Paid Per Claim

Item	Dollars Per Closed Claim	As Percent of Total Compensation Paid by Defendants and Insurers	As Percent of Net Compensation Received by Plaintiff	As Percent of Total Expenses Plus Compens- ation Paid by Defendants and Insurers
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Furthermore, most asbestos claims are clustered in a few locations around the country. Most of the suits are concentrated in areas such as Massachusetts, New Jersey, Texas, and Mississippi as a result of World War II shipyard construction.²² Localization and disproportionate concentration of asbestos claims further exacerbate the problem as plaintiffs file suit through those attorneys who have developed a specialty in the field. This concentration of cases in the hands of a few results in delay as overburdened attorneys attempt to try these cases in ever-

Total
compensation
paid by
defendants
and
insurers

\$60,000

100%

171%

63%

Total
defense
litigation
expense

\$35,000

58%

100%

37%

Item	Dollars Per Closed Claim	As Percent of Total Compensation Paid by Defendants and Insurers	As Percent of Net Compensation Received by Plaintiff	As Percent of Total Expenses Plus Compensa- tion Paid by Defendants and Insurers
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Total
expenses
and
compensation
paid by
defendants
and their
insurers

\$95,000

158%

271%

100%

Plaintiff
litigation
expense

\$25,000

41%

71%

26%

Net
compensation
plaintiff
received
after
deduction of
litigation
expenses

\$35,000

59%

100%

37%

Supra note 1, at 40.

22. *Id.* at 5.

increasing crowded courts. Since most of the claims involve similar issues (i.e., causation,²³ proof,²⁴ exposure²⁵), much of the litigation results in duplicative efforts. Although some of the process has been standardized (pleading, discovery, expert witness testimony), many of the remaining issues must be litigated repeatedly.

Lack of uniformity in tort law also hinders disposition of asbestos cases in the courts. Similarly injured plaintiffs are treated differently depending upon the rules governing liability, causation, and burden of proof in respective jurisdictions.²⁶ This inequity manifests itself in the wide range of compensation awarded.

B. Non-Traditional Approaches

1. Asbestos Claims Facility

Clearly, the need for alternative methods of disposing with these cases is recognized. One of the more well-developed plans is the Asbestos Claims Facility in New York. Developed by Harry Wellington of the Yale Law School, the Facility is a non-profit central claim-handling organization established by interested asbestos manufacturers, suppliers, and their insurers.²⁷ The ambiguous decisions reached in insurance indemnification litigation,²⁸ coupled with their attendant litigation costs, prompted a group of insurance companies to search for ways to decrease the costs of litigating their large volume of asbestos claims.²⁹ Their

23. Causation is the act by which an effect is produced. Many negligence actions turn on the determination of cause. BLACK'S LAW DICTIONARY 200 (5th ed. 1979).

24. Proof is any fact or circumstance which aids in determining the affirmative or negative nature of the proposition. There are various levels of standards of proof, e.g., proof beyond a reasonable doubt, proof by a preponderance of the evidence, etc. *Id.* at 1093-94.

25. Exposure in toxic substance litigation refers to the date and length of time a plaintiff had contact with an injurious substance, here, asbestos. Determining the period of exposure is crucial in assigning liability to the proper defendant. *See Note, Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871 (1983).

26. Lack of uniformity in tort law is beyond the scope of this Note. For further analysis, *see* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983). *See also* COSTS OF ASBESTOS LITIGATION, *supra* note 1, at 35-48.

27. For a detailed analysis and evaluation of the Facility, *see* Comment, *The Asbestos Claims Facility—An Alternative to Litigation*, 24 DUQ. L. REV. 833 (1986).

28. *See supra* notes 11-16 and accompanying text.

29. Some of the companies are: Aetna Life and Casualty, Alliance of American Insurers, Continental Insurance Companies, Fireman's Fund, The Hartford, Home Insurance, Insurance Company of North America, and Liberty Mutual. Note, *Fifty Companies Sign Up for Wellington, Making Plan Feasible*, 1(1) MEALEY'S LITIGATION REP. INS. 763, 763-64 (1985). The effect of the Manville bankruptcy upon the formation of the Facility is beyond the scope of this Note. For further analysis, *see* Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation vs. The Common Law Tort System*, 61 TEX. L. REV. 1297 (1983).

report suggested alternatives to the court system to spur resolution of asbestos claims in a cost-efficient manner.³⁰ One of the proposals was a central claim-handling center, and the Asbestos Claims Facility came into existence.³¹

The Facility does not attempt to supplant traditional litigation, but instead begins to operate if settlement negotiations break down. If settlement cannot be reached, the Facility appoints counsel to represent the litigants. Typically, all member-defendants in one litigation are represented by the same counsel rather than by individual attorneys. This substantially lowers litigation costs.³²

The Facility represents the best of compromise: manufacturers agree to drop coverage suits against their insurers while insurance companies agree to pay the settlement regardless of when the plaintiff's cause of action arose, thus effectively rendering a large part of the tort issues moot.³³ Once compensation is determined through negotiation, arbitration, or mini-trials, the company's share of liability is based on the average cost of previous claims. The insurer's portion is based on the amount of coverage provided between time of exposure and time of diagnosis.³⁴

A major obstacle to the plan is the lack of initial funding for the Facility. Given the courts' record of ambiguity in assigning culpability, many insurers are reluctant to contribute to the Facility's funding.³⁵ If the Facility fails to negotiate a settlement, the entire matter is transferred to a traditional litigation setting. Thus, an insurance company could potentially incur additional expense by using the Facility, i.e., expense in funding and participating in the Facility, in addition to those costs traditionally associated with litigation.³⁶

Another obstacle to the plan is the absence of punitive damage

30. HAMILTON, RABINOVITZ & SZANTON, INC., CUTTING THE OVERHEAD COSTS OF RESOLVING ASBESTOS CLAIMS: A TIME FOR ACTION (1982) [hereinafter A TIME FOR ACTION].

31. COSTS OF ASBESTOS LITIGATION, *supra* note 3, at 29. See also Comment, *supra* note 27.

32. Liability and expenses are allocated to each manufacturer-member. These allocations assign responsibility to each based upon a percentage of the expenses per claim handled by the Facility. Thus, according to this arrangement, those manufacturers sued most frequently will continue to bear the largest share of liability. This formula establishes a method of handling similar future claims against the same defendant. See Picone, *Insurers, Manufacturers Agree to Set Up Facility to Provide Settlement of Asbestos Disease Claims*, INSURANCE ADVOC., May 26, 1984, at 4.

33. A case is moot when the issues in dispute have been resolved and no longer presents an actual controversy. BLACK'S LAW DICTIONARY 909 (5th ed. 1979). See, e.g., *Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966).

34. ASBESTOS IN THE COURTS, *supra* note 3, at 31.

35. A TIME FOR ACTION, *supra* note 30, at 24.

36. *Id.*

awards.³⁷ A plaintiff must be willing to forego receiving punitive damages in some areas to be eligible for Facility involvement.³⁸ This is hardly encouraging news to clients. Moreover, although extensive statistics exist reporting the results of previous litigation,³⁹ it remains difficult to predict the allocation of responsibility when there are twenty or more defendants in one lawsuit. This lack of certainty in assigning culpability results in a desire to attempt litigation with a traditional jury verdict.⁴⁰

The most obvious obstacle to the Facility's success is the small number of manufacturers and insurance companies currently participating in relation to the large number affected and involved in insurance litigation. Only six manufacturers initially agreed to participate and fund the Facility.⁴¹ By June of 1985, only twenty-eight manufacturers, seventeen insurance companies, and five companies had agreed to participate.⁴² Obviously a majority of participants would result in a larger deep pocket, encouraging use by claimants and decreasing the likelihood of a lawsuit.

2. Megatrial

*In re Asbestos Insurance Coverage Cases*⁴³ was recently litigated in California Superior Court. When the trial began on March 4, 1985, the litigants included five manufacturers and seventy insurance companies.⁴⁴ They were represented by over ninety law firms.⁴⁵ This "megatrial" represents an attempt by defendants at coping with the large number of successful asbestos claims filed by injured workers. Billions of dollars in damages were at stake as asbestos manufacturers sought indemnification for former judgments against them.⁴⁶

Presiding Judge Ira Brown developed innovative procedures in an attempt to keep the litigation moving. Because of the large amount of

37. Also known as exemplary damages, these are awarded in addition to property loss damages. They are intended to comfort the plaintiff when the wrong inflicted was motivated or aggravated by malice, fraud, wanton or wicked conduct, etc. As such, they also serve to punish the wrongdoer and act as a deterrent. See BLACK'S LAW DICTIONARY 352 (5th ed. 1979).

38. Comment, *supra* note 27, at 863.

39. COSTS OF ASBESTOS LITIGATION, *supra* note 1.

40. Comment, *supra* note 27, at 858-65.

41. CIGNA Corp., Pittsburgh Corning Corp., Fibreboard Corp., Armstrong World Industries, Owens-Corning Fiberglass Corp., and the Celotex Corp. *Id.* at 858.

42. The most conspicuous absence is that of the Manville Corporation. Manville has taken the position that the asbestos litigation problem is one for legislative resolution since a large number of claimants were employed in U.S. Naval Shipyards during World War II. Their major concern is the non-binding nature of the Facility's decisions. Comment, *supra* note 27, at 859.

43. Moore, *Litigates Break New Ground to Manage Megatrials*, 11(2) A.B.A. LITIGATION NEWS 1 (1986) (recent case).

44. *Id.*

45. *Id.*

46. *Id.*

evidence, all litigants were ordered to produce all "relevant, non-privileged documents within thirty days."⁴⁷ This procedure resolved typical disputes regarding discovery. From the millions of documents obtained through the court order, 150,000 were designated as "potential trial exhibits."⁴⁸ These documents were summarized and, along with any opposing counsel's objections regarding their admissibility, entered into a specially developed \$200,000 computer system. Judge Brown commissioned the development of the system in the hope that the exhibits would be more manageable. The computer system was used to produce a transcript of each day's proceedings.⁴⁹ The case was divided into multiple phases:

Phase I (March 1985 - June 1985). This phase concerns itself only with identification of policy language at issue between the insurers and their insureds.

Phase II (July 1985 - August 1985). Some of the insurance policies included asbestos exclusion clauses in the coverage. This phase determines the effect and validity of such clauses.

Phase III (September 1985 - May 1987). This phase involves the bulk of policy interpretation. Further subdivided into subsections (scope, duty to defend, etc.), this phase also allows a party to retain the right to a jury trial. Only those disputed issues would be retried before a jury.⁵⁰

Although at first blush this appears to be an innovative method of dealing with cases with large numbers of litigants, all of the existing problems associated with traditional methods of adjudication remain. The tremendous amount of time required for a megatrial, coupled with its attendant cost does nothing to spur settlement. The use of a computer in the courtroom may provide some measure of manageability, but most litigants are searching for a cost-effective method of avoiding trial altogether.

3. Legislative Solutions

As a result of intensive lobbying by asbestos manufacturers and their insurers, three bills were introduced in Congress seeking to create a federally-funded compensation system for successful plaintiffs.⁵¹

The first bill was introduced in 1981 by Senator Gary Hart of Colorado.⁵² Entitled the "Asbestos Health Hazards Compensation Act,"

47. *Id.* at 13. .

48. *Id.*

49. *Id.*

50. *Id.*

51. Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179 (1983).

52. S. 1643, 97th Cong., 1st Sess. (1981).

this bill made worker's compensation funds the exclusive remedy for plaintiffs and would have established federal minimum levels for compensation contributions by asbestos manufacturers.⁵³ This bill was defeated as a result of organized opposition by claimant groups.⁵⁴

A second solution was proposed in 1983 by Representative George Miller of California.⁵⁵ This plan, called the "Occupational Disease Compensation Act of 1983," suggested the creation of a national Toxic Substances Employee Compensation Insurance Pool. This fund, like the Hart Bill, would be the exclusive remedy for plaintiffs against manufacturers.⁵⁶ Employers and manufacturers would fund this compensation pool.⁵⁷ This proposal was also defeated.

Senate Bill 100, introduced by Senator Robert Kasten of Wisconsin, was proposed in response to mounting product liability awards.⁵⁸ Entitled "Product Liability Act," this bill attempted to set a national standard for determining liability and awarding punitive damages.⁵⁹ Such a standardization would eliminate the need to relitigate those issues anew in each suit, lowering the cost of litigating asbestos claims. This bill was approved by the Senate Commerce, Science, and Transportation Committee, but died in a subsequent committee.⁶⁰

Previous bills which have died in committee are the Asbestos Health Hazards Compensation Act (H.R. 5224, 97th Congress), and the Occupational Health Hazards Compensation Act of 1982 (H.R. 5735, 97th Congress).⁶¹

Recently passed in the Ohio Legislature is House Bill 589, now Chapter 3710 of the Ohio Revised Code.⁶² This statute provides for the appointment of Asbestos Hazard Evaluation Specialists who are charged with the responsibility of evaluating health hazards associated with asbestos materials and their removal from buildings.⁶³ The law is an attempt to cope with yet another area of litigation emanating from

53. *Id.* at §§ 4(a), 10(a).

54. *Supra* note 51.

55. H.R. 3175, 98th Cong., 1st Sess. (1983).

56. *Id.* at §§ 10(a), 11.

57. The Pool would be funded by employers who exposed workers to asbestos, as well as asbestos manufacturers. Proportionate shares would be determined on the basis of prior workers' compensation payments. Future contributions would be reassessed annually based upon the past experience of the Pool and actuarial estimations. *Id.* at §§ 11(c)(1), (c)(3)(A).

58. S. 100, 99th Cong., 1st Sess. (1985).

59. Calmes, *Congress to Face Product Liability Bill in 1985*, 42 CONG. Q. WEEKLY REP. 3067, 3069 (1984).

60. ASBESTOS IN THE COURTS, *supra* note 3, at 30-31.

61. T. LAMBROS, *supra* note 4, at 3.

62. Am. Sub. H.B. No. 589, §§ 3710.01 to 3710.17 and § 3710.99, 116th Gen. Assembly, Reg. Sess. 1985-1986 (introduced Dec. 1, 1986).

63. *Id.* at § 3710.04.

asbestos use: actions as a result of negligent removal of asbestos material from homes, schools, libraries, hospitals, and other buildings.⁶⁴ The rush to remove asbestos from these structures has resulted in the need to regulate and monitor companies providing that service. The statute requires asbestos removal companies to operate in accordance with Environmental Protection Agency guidelines but, more importantly, sets liability limits for negligent removal procedures.⁶⁵ Liability is limited to negligence, only, when removal is performed in accordance with Federal regulations.⁶⁶ If found negligent, companies are fined at least \$10,000 but not more than \$25,000, and company officers receive no more than two years in prison.⁶⁷

Although the enactment of this Bill may reduce the amount of future litigation, it does nothing to diminish cases pending on the docket. Hope, in Ohio, revolves around the Ohio Asbestos Litigation Plan.

IV. OHIO ASBESTOS LITIGATION PLAN (OAL)

A. Goals and Methodology

Although Ohio is not among the jurisdictions with the largest caseload of asbestos claims, the number of cases filed are sufficient to have caused a backlog on the docket.⁶⁸ In an attempt to move these cases forward, all asbestos cases pending in Federal District Court for the Northern District of Ohio were consolidated and transferred to the docket of Judge Thomas D. Lambros on June 1, 1983.⁶⁹ Judge Lambros appointed Eric D. Green and Francis E. McGovern as Special Masters to study the use of alternative methods of dispute resolution and create

64. Although no statistics exist, it is anticipated that negligent removal of asbestos from homes and public buildings will mature into tort actions in a similar manner as those actions resulting from use of asbestos. The lucrative nature of the asbestos removal field resulted in the formation of ill-equipped and unreliable companies holding themselves out as experts. It is only a matter of time before those workers involved in the removal process begin to develop asbestosis, mesothelioma, etc. This litigation promises to be no less complicated than current asbestos litigation.

65. Am. Sub. H.B. No. 589, §§ 3710.01 to 3710.17 and § 3710.99, 116th Gen. Assembly, Reg. Sess. 1985-1986, at § 3710.14(C).

66. *Id.* at § 3710.17(A).

67. *Id.* at § 3710.99(B)(1)(2).

68. At the time of the implementation of the plan, approximately 80 cases were pending in District Court. That number has now grown to approximately 2,000 cases. Telephone conversation with Hartley Martyn, Law Clerk to Judge T. Lambros, United States District Court for the Northern District of Ohio (Feb. 11, 1987).

69. OAL Order No. 1. The OAL orders were developed by Special Masters Eric Green and Francis McGovern who were appointed by Judge Lambros to assist in the development and implementation of the OAL Plan. T. LAMBROS, OHIO ASBESTOS LITIGATION: IMPLEMENTATION ORDERS (1983).

a plan to manage the caseload cost-effectively.⁷⁰ The Special Masters were charged with "formulat[ing] a methodology for facilitating a resolution by settlement, either as to designated parties, as to entire causes of action, or as to all pending cases."⁷¹ This plan, although tailored to meet the needs of Judge Lambros' docket, was also developed with an eye toward national implementation. The plan needed to be "flexible, multi-faceted, and take into account the individual characteristics of each case and the interests of all parties to the litigation."⁷² Notions of equity and cost-efficiency were paramount in the development of the plan.

The Special Masters examined each case on the docket as well as pending cases in other Ohio jurisdictions. Three open meetings were held so that members of the local bar were given the opportunity to recommend proposals. Input was received from representatives of the asbestos manufacturers and their insurance companies, and a survey was conducted to collect and analyze previously suggested alternative methods to determine if any were workable. The result of this activity was the Case Management Plan.⁷³

B. Components

1. Case Management Plan (CMP)

The Case Management Plan (CMP) classifies pending and new claims according to the type of asbestos material used by the plaintiff. The five major types are insulation cases, manufacturing materials cases, friction materials cases, asbestos and other materials cases, and employer-defendant cases (intentional harm).⁷⁴ This classification serves to facilitate docket categorization and streamline the discovery process which typically inundates parties in asbestos litigation. In the event the lawsuit fails to conform to one of these categories, a new CMP may be requested.⁷⁵ This is the situation with the recent proliferation of maritime asbestos cases filed in Ohio. The introduction of a specially developed CMP tailored to maritime cases is an example of the flexibility of the OAL. Maritime cases involve issues not present in land-related asbestos use.⁷⁶ More than one thousand cases have already been filed and assigned

70. T. LAMBROS, *supra* note 4, at 3. See also Fed. R. Civ. P. 53.

71. T. LAMBROS, *supra* note 4, at 4.

72. *Id.* at 8. The OAL Plan has its own Rules of Procedure.

73. *Id.* at 6-8.

74. *Id.* at 13. A typical OAL case generally falls within the insulation category.

75. *Id.* at 14.

76. For example, sailors are typically assigned to numerous vessels owned and manufactured by various companies. The jurisdictional quagmire of maritime cases also exacerbates the problem. E. GREEN, OAL MARITIME ASBESTOS LITIGATION 4 (1987).

to Judge Lambros' docket,⁷⁷ and it is estimated that up to ten thousand maritime asbestos cases may be filed in Northern Ohio.⁷⁸

Each class of cases has a timetable developed to encourage settlement. This timetable regulates "all pleadings, discovery, motions, conferences, and trials."⁷⁹ For example, the timetable compresses the discovery process and standardizes the pleadings and discovery requests.⁸⁰ Two "settlement/status conferences" occur during discovery in an effort to promote settlement and identify pre-trial problems.⁸¹ Throughout this process, the possibility of implementing alternative dispute resolution procedures is evaluated. Issues are redefined and trial procedures outlined.⁸²

2. CMP-Type I-Insulation

(a) *Pleadings*. All pleadings must include the words "Ohio Asbestos Litigation" in the caption. The cases are then filed in a "Master OAL File."⁸³ Each complaint must include a completed OAL Form 1.⁸⁴ This

77. *Id.* at 3. The expansion of the original OAL plan to allow for new classes of cases such as maritime injuries points to the flexibility of the current plan. It is easy to envision how this plan could accommodate other causes of action, as yet unknown.

78. *Id.*

79. T. LAMBROS, *supra* note 4, at 14.

80. This is in contrast to the Federal Rules of Civil Procedure 23-37 which do not specify time-limits.

81. T. LAMBROS, *supra* note 4, at 21.

82. *Id.* at 28.

83. *Id.* at 15. The filing of pleadings and other documents in the Master File is for convenience only. Attorneys are encouraged to consult the File when filing new cases in an effort to standardize the process and expedite the proceedings.

84. OAL FORM 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

)

) OAL CASE NO. _____

) OHIO ASBESTOS LITIGATION PLAINTIFF

) (PLAINTIFF'S DECEDENT) AFFIDAVIT

)

1. Identify your (or decedent's) name, address, and date of birth.

2. Indicate which of the following types of activity resulted in your (or decedent's) exposure to asbestos:

_____ (a) insulation (e.g. insulator or relative of insulator)

_____ (b) manufacturing products (e.g. plant worker or relative)

form defines the issues early in the proceeding and indicates the type of asbestos case being alleged by the plaintiff. The appropriate CMP is then assigned.

(b) *Discovery*. All discovery requests are collected and included in an "OAL Consolidated Discovery Request" (CDR). This form is used for interrogatories (Federal Rules of Civil Procedure, Rule 33), requests for admission (Federal Rules of Civil Procedure, Rule 36), and requests for production of documents (Federal Rules of Civil Procedure, Rule 34). This standardized form requires biographical information, income and union records, worker's compensation transcripts, Social Security records, military service records, Veteran's Administration records, and all relevant medical records of the plaintiff.⁸⁵ The plaintiff must respond to the defendant's first CDR within sixty days.⁸⁶ While there is no limitation on the number of CDR's, two from each party is considered sufficient in most cases.⁸⁷ Upon receipt, the defendant has thirty days to respond to plaintiff's first CDR.⁸⁸ Generally, liability and product identification is required. Failure to meet discovery deadlines can result in judicially-determined sanctions, such as attorney's fees and a motion to compel.⁸⁹ Each party is obligated to supplement their responses when new information becomes available, as provided in the Federal Rules of Civil Procedure.⁹⁰

(c) *Depositions*. Depositions and medical examinations are also subject to time constraints. The defendant has 120 days within which to complete plaintiff and witness depositions.⁹¹ Medical examinations are subject to

_____ (c) fiction materials (e.g. brake repairer or relative)

_____ (d) other _____
(Indicate nature)

3. Do you contend in your suit that products other than asbestos caused you (or decedent) any harm?
4. In this case are you suing one or more of your (or decedent's) employers?
5. Indicate the dates of your (or decedent's) employment, employer, employer's address and type of employment:

<i>DATES OF EMPLOYMENT</i>	<i>EMPLOYER</i>	<i>ADDRESS</i>	<i>TYPE OF EMPLOYMENT</i>
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85. T. LAMBROS, *supra* note 4, at 16. If this information is not available, the plaintiff is required to make available a release form.

86. *Id.* at 18.

87. *Id.* See also *supra* note 68.

88. *Id.*

89. T. LAMBROS, *supra* note 4, at 23. This is similar to Federal Rule of Civil Procedure 37.

90. *Id.*

91. *Id.* at 19.

the same time period.⁹² No further depositions are permitted until after the Settlement/Status Conferences.⁹³ Any disputes (procedural, legal, etc.) are resolved by specially appointed magistrates.⁹⁴ These rulings are final and must be made within seventy-two hours.⁹⁵

(d) *Settlement/Status Conferences*. The CMP requires two "settlement/status conferences" to take place during the discovery period. Conference Number One must convene within 60 days after the plaintiff responds to the defendant's first CDR.⁹⁶ At this time, the possibility of early settlement is negotiated. The case is then evaluated to determine if alternative methods would dispose of the case.⁹⁷

Conference Number Two must take place within 120 days after the defendants respond to the plaintiff's second CDR.⁹⁸ Thirty days prior to the second conference, the plaintiff is required to present an acceptable settlement offer.⁹⁹ At the second meeting counsel discusses settlement of the action, alternative methods of disposition (if appropriate), simplification of the issues, elimination of unnecessary proof, and any other issues which facilitate disposition.¹⁰⁰ All parties must be in a position to negotiate for their clients without a time delay.¹⁰¹ Thus, counsel for all parties must have authority to accept a settlement offer or to make stipulations and/or admissions.¹⁰²

These conferences allow two formal opportunities for settlement, and encourage settlements by requiring the litigants to spend long hours in conference.¹⁰³ This can be interpreted as "leverage" or "pressure," depending upon how the idea of early settlement is viewed.

C. An Evaluation

The OAL is a unique plan with its own Rules of Procedure. It is suggested that the OAL is the only comprehensive plan in existence with a built-in, ongoing evaluative process.¹⁰⁴ The Plan is dynamic and flexible, as evidenced by the newly-designed Maritime OAL Plan.¹⁰⁵

92. *Id.* at 21.

93. *Id.* at 19.

94. *Id.* at 23.

95. *Id.*

96. *Id.* at 21.

97. *Id.*

98. *Id.* at 22.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 22-23.

103. Riley, *Asbestos: New Approaches*, NAT'L. L.J., May 7, 1984, at 26.

104. Telephone conversation with Atty. Percy Squire, Special Master assigned to OAL Maritime Asbestos Litigation (Feb. 16, 1987).

105. See *supra* notes 76-77 and accompanying text.

Although there are no formal statistics reported as yet, it is estimated that two hundred cases disposed of through the use of the CMP would compare to only eight or nine during the same time period if traditional litigation methods were used.¹⁰⁶ Of the five hundred cases presently disposed of through the CMP, all were settled without trial, with the exception of two. Those two cases settled immediately after opening statements at trial.¹⁰⁷

There appears to be much interest in adapting the OAL to other areas of the country with large numbers of asbestos cases on the docket.¹⁰⁸ It remains to be seen whether the OAL is easily transferable to other districts.

The CMP has been criticized for placing undue pressure on the parties to settle during the pre-trial phase.¹⁰⁹ Although injured parties are usually anxious to settle and receive compensation, economic efficiency should not preclude the right to a jury trial. The OAL, in its zealous and rigorous pursuit of pre-trial settlement, treads dangerously near article III of the Constitution and the seventh amendment.¹¹⁰ While foregoing settlements is not inherently wrong, the twin guarantees of due process and right to a jury trial are too precious to be traded off in exchange for judicial efficiency. For this reason, opposition exists to all types of dispute resolution.¹¹¹

For all its apparent specificity, the OAL still employs an ad hoc approach to case disposition. Each case must be examined and analyzed individually. Presently, no single analysis has been developed which can be systematically applied to all cases. Relying upon the results of previously resolved cases does not take into account dynamic changes in asbestos litigation.

Finally, a major drawback to the CMP approach is its failure to address the insurance indemnification issue.¹¹² There are no provisions for extending the CMP to provide for indemnification suits. These suits still comprise a large number of asbestos-related cases.

106. *Id.*

107. *Id.*

108. For example, Judge Zobel in Massachusetts, and Judge Parker in Texas are both investigating the feasibility of implementing all or part of the OAL. Telephone conversation with Atty. Percy Squire, Special Master assigned to OAL Maritime Asbestos Litigation (Feb. 16, 1987).

109. See Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 *RUTGERS L. REV.* 253 (1985).

110. U.S. CONST. art. III, § 2 states "The Trial of all Crimes . . . shall be by Jury" The seventh amendment, enacted in 1791, provides for the right of a jury trial.

111. 1 *THE AMERICAN EXPERIENCE* (R. Abel ed. 1982).

112. See *supra* notes 11-16 and accompanying text.

V. CONCLUSION

Dissatisfaction with current and proposed procedures remains. So long as the number of asbestos-related cases continues to grow, cost-effective alternatives will be developed and considered in an attempt to provide timely resolution to injured plaintiffs.

A mixture of traditional and non-traditional methods may provide the solution to this most challenging area of twentieth-century tort law.

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